No. 140
Br. of Stockslager & Heard for Appellee
SUPREME COURT U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1898.

TERM No. 140.

THE HENRIETTA MINING AND MILLING CO.,
Appellant.

vs.

JAMES I. GARDNER,
Appellee.

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In the Supreme Court of the United States

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TERM NO. 140.

THE HENRIETTA MINING AND MILLING COMPANY,
Appellant.

vs.

JAMES I. GARDNER,
Appellee.

Appeal from the Supreme Court of Arizona.

Brief for Appellee.

STATEMENT.

This case is before the court on appeal by the appellant, defendant below, from the decision of the Supreme Court of Arizona, affirming the decision of the District Court of Yavapai County, awarding Gardner $12,332.08, and ordering the sale of certain property attached in the proceeding.

The errors assigned are:

(1) That the judgment rendered in the case was a personal judgment, without personal service.

(2) That the attachment lien was foreclosed and property ordered sold without any notice of such attachment proceedings.

(3) Ordering sale of property without finding of facts upon which to base the same, and—

(4) Issuing and executing attachment before issue and delivery of summons.

ARGUMENT.

The first error assigned is that a personal judgment was rendered upon substituted service only.

An examination of the Record shows that no personal judgment was rendered. The court found the amount of principal, interest and costs due and ordered the sale of the property attached to satisfy the same. There was no judgment over for any balance remaining unpaid after sale of attached property.

In the case of Cooper *vs.* Reynolds (77 U. S. 308), this court said:

"But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

"That such is the nature of this proceeding in the latter class of cases, is clearly evidenced by two well-established propositions: First, the judgment of the court, *though in form a personal judgment* against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court

or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendants out of any other property than that attached in the suit."

The judgment in the case at bar is a judgment for the sale of the attached property only, and execution was not awarded for any balance which might remain unpaid after such sale. Hence, it is seen that even though it might be a personel judgment, in form, inasmuch as it seeks to subject the attached property only to the payment of the judgment, it is in fact a judgment *in rem*.

2.

The second alleged error is the foreclosure of the lien, and sale of the attached property without any notice of the attachment proceeding.

It is contended that the publication of the summons, provided for by the Arizona statute, should have contained a notice of the pendancy of the attachment proceedings, as well as of the pendancy of the action.

The statute (Section 712 R. S. 1887), makes no requirement other than that the sheriff shall serve the summons by making publication thereof. "Such *summons shall be published*," etc, is the language of the statute.

An ordinary summons is issued, and in cases of non-residence *such summons* must be published by the sheriff, etc. It is clear, therefore, no notice of the pendancy of the attachment proceedings is

required by the laws of Arizona, but the publication of the summons in the action is sufficient.

A similar question was raised in the case of Redman *vs.* Burgess, before the Court of Appeals of Indiana, and decided June 9, 1898 (Northeast Reporter Vol. 50, p. 285). In that case the court held:

"Attachment and garnishment not being causes of, but incidents to, actions, we do not deem it essential that the affidavits for attachment or the *notice of the pendancy of the suit* should state that the demands were to be enforced by these *auxilliary proceedings*."

Again it has been held by this court, that jurisdiction in such cases is acquired by the levy of the writ of attachment on the defendants' property. Cooper *vs.* Reynolds, *supra* and Pennoyer *vs.* Neff, 95 U. S. 714, and cases cited. In the latter case it is said:

"The law assumes, that property is always in the possession of its owner, in person or by agent, and proceeds upon the theory that its seizure will inform him that it is taken into the custody of the court and that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."

We contend, therefore, that the publication of the summons was regular in all respects; but that, the defendants' property having been duly attached, and in the custody of the court, jurisdiction thereof was acquired without regard to the regularity of the notice.

3.

Referring to the assignment of error, that the court ordered the attached property sold without any finding of fact on which to base the same, it is only necessary to say that the court found that—

—"the Defendant was *duly* and *regularly served with process herein* and an attachment was *duly* and *regularly levied* upon *its property* in said County of Yavapai. * * *

And it appearing to the court that a writ of attachment heretofore issued in this cause was, on the 26th day of December 1894, by the sheriff of Yavapai County, Arizona, levied upon the following described property of the defendant, all of the right, title and interest of the Henrietta Mining and Milling Company, a corporation, in, and to the following described real estate (describing the property):

It is therefore ordered, adjudged and decreed that said attachment lien as it existed on the 26th day of December, 1894 be, and the same is, foreclosed, and that an order of sale be issued," etc.

Here we have a finding that the Defendant was *duly* and *regularly* served with process, that the attachment was duly and regularly levied of its property in the County of Yavapai and the foreclosure of the attachment lien, as it existed on the day of its levy.

This is certainly amply sufficient to support the order of sale which followed.

If the defendant was *duly* and *regularly* served with process, and the *attachment* was *duly* and

regularly levied of defendants property in the county, as found by the court, all the steps necessary to be taken to make such proceedings regular, were shown to have been taken.

4

In the fourth assignment of error it is alleged that the attachment was issued and executed before issue and delivery of summons.

This statement is not borne out by the Record. The summons was issued on the 26th day of December, and the sheriff's return shows the attachment, which was issued on the 24th day of December, was levied on the 26th, the day the summons was issued.

This proceeding was all in strict accordance with the statutes of Arizona.

Section 649 R. S. 1887, provides that:

"All civil suits in Courts of Record shall be *commenced* by *complaint filed in the office of the clerk of such court.*"

As to issuing attachments, section 42 R. S. 1887 provides:

"No such attachment shall issue until the *suit has been duly instituted,*" etc.

Now, it is seen the commencement of a civil suit is by "filing complaint," and not by issuing summons and delivering it to the sheriff, as in many of the States. It is clear therefore, that the attachment was not irregular, because it was issued be-

fore the issuance of the summons, the suit having been instituted by filing complaint December 4, 1894 (Record p. 29).

Again by the Act of March 6, 1891, amending the attachment law (Acts of 1891 p. 49), it is provided:

"The plaintiff *at the time of issuing summons or at any time afterward*, may have the property of the defendant attached," etc.

From these provisions it results, that a suit is "commenced" by filing complaint with the clerk, and that at any time after such commencement of suit, the plaintiff may have attachment, but that he can not have the property of the defendant attached until "at or after the time of the issuing of summons."

In this case the attachment was not issued until after the commencement of the suit, and the defendant's property was not attached until after the time of the issuing of the summons.

Counsel cites with great confidence two cases from Kentucky and one from California and Vol. 3, page 50 of the Encly. of Pleading, where these authorities are grouped, in support of his contention.

The Kentucky cases do not maintain his position, Keller *vs.* Stanley 86 Ken. 240, quotes the statutes of Kentucky bearing upon this question:

"An action is *commenced* by filing in the office of the clerk of the proper court a petition, stating the plaintiff's cause of action * * * and * * * by causing a summons to be issued or a warning order to be made thereon."

Now let us bear this statute in mind and then look to see what their Kentucky statute is as to when an attachment may be issued. Section 194 of the Civil Code of Kentucky provides that the plaintiff may at or *after the commencement of an action*, have an attachment issued against the defendant. In deciding the case above cited the court holds that there was no summons issued prior to the issuance of the attachment, hence the attachment was void, the action not having been commenced. The other Kentucky case is cited by the court in deciding the Keller case and this case, as we take it, is but a re-affirmation of the doctrine contained in the latter case.

Counsel chiefly relies on the case of Low *vs.* Henry, 9 Cal. 538. Justice Baldwin in deciding that case holds, that the attachment was void, because it was issued *before the action was commenced;* but in his decision he cites the 22nd section of the practice act, then in force in California, which provides that a suit shall be *commenced* by the *filing of a complaint* and the *issuance of a summons.*

Here the attachment having been issued before the issuance of summons, it was issued *before the action was commenced*, and was therefore contrary to the statute, and void.

Counsel cites this case as being in point and decisive of the case at bar. But, as we have seen when the difference in the statutes of California and Arizona is considered, that case has no bearing whatever upon the question at issue.

Counsel is therefore in error, as appears from his

quotation of the California statues at pages 7 and 8, of his brief, in his statement, that the Arizona statute was taken from that of California and is precisely like it, using its identical language.

It may be contended that under the second assignment of error, which is that the sale of defendant's property was ordered "without there having been any actual or constructive notice of any kind whatever given to defendants of the institution of any such proceedings *or of any other kind*, raises the question of the sufficiency of the notice of publication.

So far as the attachment is concerned (and there is nothing else involved in the case), we have seen that the court acquired jurisdiction by the levy of the attachment of the property of the defendant, in the said county of Yavapia.

With such levy and taking into the custody of the court, complete jurisdiction over it was acquired by the court. Cooper *vs.* Reynolds and Pennoyer *vs.* **Neff**, *supra*.

This being the case it is hardly necessary to pursue the argument further.

But, aside from this view of the law, this court, in the case of Applegate *et al*, *vs.* Lexington and Carter County Mining Co. *et. al.* (117 U. S. 255) held:

"When a court of general jurisdiction is authorized to bring in, by substituted service, non-resident defendants interested in property within its jurisdiction, but is not required to place the proof of service upon the record, and it orders such service, it will be presumed in favor of the jurisdiction

that service was made as ordered, although no evidence thereof appears of record; and a judgment affecting the property will be valid."

It was contended in the Supreme Court of Arizona, that the judgment did not show that a copy of the summons was mailed to the defendant, as required by section 713, Revised Statutes of 1887, in cases where the residences of non-resident defendants are known.

But the Arizona Statute makes no provision for *proof* of this fact. It results that the court may require such proof of this fact as may seem proper to it, and it certainly will not be insisted that when there is no statutory provision as to any return or proof of this fact, the court would be required to state what proof was received, or to make any special reference to it in the finding.

The contention that the Record shows this particular statutory requirement was *not* complied with, is shown to be erroneous by an inspection of the judgment. The most that can be said is, that the record is *silent* upon the point. But, the court does find "the defendant was duly and regularly served with process herein." This is all that is necessary. This court will presume the lower court had sufficient proof of that fact before it.

In cases where the Record is silent, in a court of general jurisdiction, acting within the boundaries which the law assigns to it, the court is presumed to have acted rightly and to have jurisdiction to render the judgment it pronounces until the contrary appears.

If the Record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge.

Settlemier *vs.* Sullivan (97 U. S. 444). See also, Gilchrist *vs.* Cannon (1 Coldw.–Tenn–581).

There is nothing in the Record to contradict the finding of the court that the defendant was duly and regularly served with process.

It may be doubted also whether this requirement of the plaintiff, to mail a copy of the summons, in this class of cases is essential. The Supreme Court of Minnesota have held otherwise, as we understand their decision. In the case of Bausman *vs.* Tilley, decided April 8, 1891 (48 N. W. Reporter 459), which was a motion by a non-resident defendant within one year after judgment by default, upon substituted service, for leave to answer and defend, under provision of section 66 general statute of 1878. It was contended that as it was admitted a copy of summons was mailed and not shown it was not received, there had been *personal* service and the defendant was not entitled to the provisions of section 66 *supra*.

The court held there was no distinction in the statute between non-residents whose residence was known and copy of summons mailed to them and those whose residences were unknown, and proceeded to say :

"In all of the cases covered by and provided for in section 64, there must be substituted service, that is, by publication of the summons in the manner

specified in section 65 and it is by virtue of this publication that the court acquires jurisdiction. *It is of no consequence*, except as the fact might bear upon the question of diligence, that a copy of the summons has been mailed to or received by the defendant at his place of residence outside of the territorial limits of the State."

Of still less importance is it in a case like the one at bar where jurisdiction of the property was acquired by levy of the attachment.

Again, as the defendant in the case at bar made default and filed no motion for a new trial or rehearing, its appeal brings before this court for review the judgment roll only. What the judgment roll shall consist of is fixed by statute in Arizona. Section 810 R. S. 1887, provides that the following papers shall constitute the judgment roll in cases where there has been no answer filed:

"The summons with the return of service, the complaint and a copy of the judgment."

The statute does not require the *sheriff* or other officer to mail copy of the summons, and of course proof of that fact could constitute no part of the "return of service" of summons as the sheriff alone makes return. Neither does the statute require plaintiff to file his affidavit showing such mailing to have been done. It is silent as to how this statutory requirement shall be proven.

This being the case, the court may hear oral proof of the fact, at the trial. And when in its judgment it is stated that the defendant was "duly

and regularly served with process," it will be presumed such proof was required as satisfied the court, the law had been complied with. It was not necessary to set out the proof made as to such mailing, and the Record being silent, regularity will be presumed. Settlemier *es.* Sullivan, *supra.*

We submit that the judgment of the Supreme Court of Arizona should be affirmed.

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